

# St. John's Law Review

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Volume 39  
Number 2 *Volume 39, May 1965, Number 2*

Article 2

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May 2013

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### Recommended Citation

Cowen, Lindsey (1965) "Some Additional Thoughts on "States Rights", *St. John's Law Review*. Vol. 39 :  
No. 2 , Article 2.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol39/iss2/2>

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## SOME ADDITIONAL THOUGHTS ON "STATES' RIGHTS"

LINDSEY COWEN †

*The question of the relation which the States and General Government bear to each other is not one of recent origin. From the commencement of our system, it has divided public sentiment. Even in the convention, while the constitution was struggling into existence, there were two parties as to what this relation should be, whose different sentiments constituted no small impediment in forming that instrument. After the General Government went into operation, experience soon proved that the question had not terminated with the labors of the Convention....<sup>1</sup>*

THESE WORDS of John C. Calhoun, uttered on July 26, 1831, have an unfortunate relevance today, one hundred and thirty-four years later. The problem is still with us, still unsolved, although exceptionally fine legal minds have been struggling with the question over the intervening years. Emotional references to states' rights are daily heard, and our modern society seems to be no closer to a generally acceptable solution than were the founding fathers in 1789.

Despite this, the Constitution of the United States is a truly remarkable document. It has been referred to as "the most wonderful work ever struck off at a given time by the brain and purpose of man,"<sup>2</sup> and the federal system

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<sup>1</sup> Address by John C. Calhoun, in VA. COMM'N ON CONSTITUTIONAL GOV'T, THE FORT HILL ADDRESS OF JOHN C. CALHOUN (1960).

<sup>2</sup> Gladstone, *Kin Beyond the Sea*, North American Rev., Sept. 1878.

of government which it established has endured longer than has any other of its type in the history of the world. It has served, and continues to serve, as a model which has commended itself to many nations, both old and new.<sup>3</sup>

In this most remarkable work the critical task was the assignment of certain matters of governmental concern to the national government, and other matters to the states. The framers of our Constitution recognized not only the need for united action on certain problems, but also the appropriateness of diversity of decision on others. In our own Constitution, we attempted an enumeration of the powers of the federal government,<sup>4</sup> and then, in the tenth amendment adopted soon after the Constitution's ratification, the fact of delegation was emphasized. That amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>5</sup> But this, as John C. Calhoun recognized in 1831,<sup>6</sup> and as we see on all sides today, did not resolve the problem. We still hear and read that the states are losing their sovereignty, and that the federal government and, in these days particularly, the federal courts, are usurping the powers of the states. The ghost of states' rights still haunts us.<sup>7</sup>

The "Additional Thoughts on 'States' Rights,'" which are to be suggested here, center around the bald proposition that a state, or any other territorial designation insofar as that is concerned, is not of primary importance. Any such unit is not the end product which must be protected at all costs. Instead, society's concern ought to be for people and the needs of people; it ought to concentrate on how best to meet these needs and stop debating theoretical questions which have little if any practical value.

<sup>3</sup> See generally *FEDERALISM: MATURE AND EMERGENT* (Macmahon ed. 1955); *STUDIES IN FEDERALISM* (Bowie & Friedrich ed. 1954).

<sup>4</sup> *E.g.*, U.S. CONST. art. I, § 8, art. II, § 2.

<sup>5</sup> U.S. CONST. amend. X.

<sup>6</sup> See text accompanying note 1 *supra*.

<sup>7</sup> BLOCH, *STATES' RIGHTS—THE LAW OF THE LAND* (1958); see also U.S. News & World Report, Jan. 18, 1965, p. 56.

To define the concept of a state is an exceedingly complex task.<sup>8</sup> But, whatever else may be said about a state, it is an artificial entity. It is the product of man's brain. It is a means to an end; a device to permit particular men in geographic proximity to live together in relative peace and contentment. No state is inherently a state. That which we call New York, or California, or Louisiana, is a state only because people, in more or less accidental fashion, decided that it should be a state.

Consider the East Coast of the United States. Prior to 1600, there were no European settlers. The land was held, or utilized, by people who came to be known as American Indians. In the early part of the 17th century, the white man came to settle. Sometimes there was no initial resistance, but sooner or later the Indians realized what was happening and violence became common. Inexorably the tide of history swept over them, and control of the land and the people on it was transferred to those hands which had the physical power to compel their way.<sup>9</sup>

There is no intention here to quarrel with the over-all desirability of the change. Certainly the course of world history would have been fundamentally different had there been no colonization of America. And from our present vantage point, it appears that world society has profited immeasurably by the appearance, growth, and maturity of the United States of America. But the plain, unvarnished fact is that the United States of America exists here as a nation, and the individual states as states, because our ancestors had the power to organize and control, and did so.

The organization was, in many respects, accidental. Natural barriers had some influence, of course. The Potomac River between Virginia and Maryland is at least a partial example. But the Chesapeake Bay was not used that way at all, portions of both Virginia and Maryland lying on both sides with the peninsula divided arbitrarily and artificially

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<sup>8</sup> *E.g.*, Kelsen, *GENERAL THEORY OF LAW AND STATE* (1945).

<sup>9</sup> BEARD, *BASIC HISTORY OF THE UNITED STATES* (1944) may be consulted for detailed information.

between Delaware, Maryland, and Virginia. In the main, decisions were made in England where colonies were established with certain metes and bounds, or other designations of area, none of which were inherently required. Some boundaries were rational; others not. But local governments were established, and in the course of time conflict between them and the British Crown and Parliament developed and ultimately erupted into war and the Declaration of Independence. At this juncture the necessity of union was recognized and thus, in June 1776, work began on the Articles of Confederation and Perpetual Union, the implication of the *complete* title being all too frequently forgotten. The proposition was made crystal-clear, however, by Article XIII which read: "And the Articles of this Confederation shall be inviolably observed by every state and the union shall be perpetual. . . ."

On July 9, 1778, ten of the thirteen original Colonies ratified the Articles. New Jersey followed on the 26th of November, 1778; Delaware on February 23, 1779; and Maryland on March 1, 1781.

These Articles, however, were soon demonstrated to be too weak to be of practical value, and, in May 1787, a Convention, convened for the purpose of amending the Articles, soon decided to form instead a national government under a new Constitution. On September 17, 1787, the resulting Constitution was forwarded to the Congress and, on September 28, 1787, by the Congress "transmitted to the several legislatures, in order to be submitted to a Convention of delegates chosen in each state, by the people thereof. . . ." <sup>10</sup>

The preamble to that Constitution is a most enlightening paragraph. It reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>11</sup>

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<sup>10</sup> 1 ELLIOT'S DEBATES 319 (1941 reproduction of 2d ed. 1836), wherein can be found the various historical documents referred to in this article.

<sup>11</sup> Preamble to U.S. CONST.

Although the preamble has from time to time been the subject of comment, it has not in general received as much attention as the other parts of the document. What analysis there has been has tended to center around the use of the words "People of the United States" as distinguished from simply "People." Thus, those who have espoused the theory of states' rights and state sovereignty have asked why the language "We the People of the United States," rather than just "We the People" was used, the point being that the *states* were uniting, not just the people. Others have felt the choice of language much less significant.<sup>12</sup> However, this de-

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<sup>12</sup> Compare BLOCH, *op. cit. supra* note 7, at 12 with CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 1 (12th ed. 1958). On the issue of whether the Constitution emanated from the states or the people, Mr. Chief Justice Marshall early took a position in favor of the people as the source of federal power. In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 402-04 (1819), he said:

"In discussing this question, the counsel for the state of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument, not as emanating from the people, but as the act of sovereign and independent states. The powers of the general government, it has been said, are delegated by the states, who alone are truly sovereign; and must be exercised in subordination to the states, who alone possess supreme dominion. It would be difficult to sustain this proposition. The convention which framed the constitution was indeed elected by the state legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing congress of the United States, with a request that it might 'be submitted to a convention of delegates, chosen in each state by the people thereof, under the recommendation of its legislature, for their assent and ratification.' This mode of proceeding was adopted; and by the convention, by congress, and by the state legislatures, the instrument was submitted to the *people*. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. It is true, they assembled in their several states—and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass. Of consequence, when they act, they act in their states. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.

"From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied, in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments. The constitution, when thus adopted, was of complete obligation and bound the state sovereignties . . . The government of the Union, then (what-

bate is not particularly pertinent to the immediate thesis. What are pertinent are the *purposes* of the union:

1. In order to form a more perfect union;
2. To establish justice;
3. To insure domestic tranquility;
4. To provide for the common defense;
5. To promote the general welfare;
6. To secure the blessings of liberty to ourselves and our posterity.

In determining any question of federal-state relations, these purposes must be kept in mind—purposes which are oriented to people, not states.

With the emphasis on people, the reasons why many of our early colonists, and why many of our early pioneers into the western country, moved into new, unknown, hostile territory as they did, become relevant. In many instances it was to escape from the rule of a majority of which they were not a part. Many of our original settlers came here to escape religious persecution; the movement to the West was dominated by restless persons who needed unrestricted personal freedom. Even within the original colonies themselves there were objections to decisions by colonial and thereafter state legislatures, the very natural feeling being that any given group ought to be free of the domination of people located somewhere else who were rarely, if ever, seen or heard other than through legislative or judicial action.

Although there are many historical examples which might be used, perhaps the most striking is that of the Trans-Allegheny area of Virginia. The mountaineers there never did fully accept the authority of the Virginia General Assembly meeting first in Williamsburg and then in Richmond, hundreds of miles to the east. Eventually a permanent split was made politically possible by the disagreement over

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ever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form, and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

secession at the time of the Civil War, and in 1863 West Virginia came into existence as a state.

It is conceded that in reality individuals cannot be islands unto themselves. Man is, and must be, a social being; and when two or more people live together in more or less close proximity, when they face common dangers and have common problems, the individual rights of each must yield to the interests of the whole. In theory, people accept the principle of majority rule, provided there are certain protections for the rights of minorities. Yet, at the time of actual decision there is likely to be sharp difference of opinion on the size or dimensions of the group which is to make the decision and on the safeguards which are to be invoked.

To illustrate, assume that the question for decision is one concerning the right of Albany, New York, to dispose of waste into the Hudson River. In 1865, Albany probably did not have sufficient waste so that dumping it into the river would have created a problem for New York City. If that were true, then the citizens of New York City would have had no reason to participate in a decision on what Albany should do with its waste, and had they participated and decided adversely to Albany, the citizens of Albany would have had every right to object.

In 1965, however, the citizens of New York City would have a very great interest in it, not only because of the waste of Albany itself, but also of that of all the other cities which, in the interim, have grown along the banks of the Hudson. At this point, of course, the citizens of New York City ought to have a voice, and what was essentially a local problem in 1865 is, at the very least, a regional problem in 1965.

It could also be established that citizens of New Jersey, along the Hudson River and Upper Bay, would today be very much concerned; and, in fact, New York harbor might become so polluted that it would interfere with interstate and foreign navigation and commerce. This makes the problem an even greater one, and, upon a given state of facts, might very well make the problem appropriate for a solution by the Congress.



The framers of the federal constitution certainly recognized that there are some problems which are appropriate for local solution, some for national solution. The federal constitution undertakes to outline those which were deemed appropriate for national solution but, of necessity, the words used are typically words of general, rather than specific, meaning, leaving considerable room for interpretation and construction.<sup>13</sup> The Constitution was intended to endure through the ages and to furnish guidelines. It has so endured, because its language was capable of construction to meet changing times.

Still, there remains the very real fact that some problems are local in nature and ought to be the subject of local solution. Solving a local problem on a regional or national basis obviously contains the seeds of trouble. If a regional or a national majority decides a matter contrary to the wishes of the people of the locality which is specifically involved, then they will resent it, not so much because of any disapproval of the principle of majority rule, but because of the dimensions of the decisional group. On the other hand, if an admittedly local problem is solved locally, those in the minority, on the whole, will accept the right of the majority to make the decision, unless there has allegedly been a denial of some fundamental right. It should be emphasized, however, that the issue of states' rights typically arises in a dispute over the dimensions of the decision-making group.

This can readily be seen in the recent reapportionment cases.<sup>14</sup> Advocates of states' rights claimed that the appor-

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<sup>13</sup> *E.g.*, "To regulate Commerce with foreign Nations, and among the several States. . . .

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." U.S. CONSR. art. I, § 8.

<sup>14</sup> Recent cases decided with full opinions after oral argument were: *Reynolds v. Sims*, 377 U.S. 533 (1964) (Ala.); *WMCA Inc. v. Lomenzo*, 377 U.S. 633 (1964) (N.Y.); *Maryland Comm'n for Fair Representation v. Tawes*, 377 U.S. 656 (1964) (Md.); *Davis v. Mann*, 377 U.S. 678 (1964) (Va.); *Lucas v. 44th Gen. Assembly of Colo.*, 377 U.S. 713 (1964) (Colo.).

In addition, the Court disposed of the following reapportionment cases in memorandum decisions: *Beadle v. Scholle*, 377 U.S. 990 (1964) (Mich.); *Swann v. Adams*, 378 U.S. 553 (1964) (Fla.); *Meyers v. Thigpen*, 378 U.S.

tionment scheme of a state legislature was a local decision to be made in terms of local standards and requirements. Contrariwise, the Supreme Court held that the decision must be made in the light of a "basic constitutional standard"<sup>15</sup> uniformly applicable to all the people.<sup>16</sup> However, the task of remedying a nonconforming apportionment scheme was to be remanded to a local level where "a variety of local conditions"<sup>17</sup> could be appraised. Thus, although apportionment schemes are local creations, their validity is dependent upon constitutional standards which are nationally defined.

This raises the critical question of who has the ultimate decision of defining the dimensions of the decision-making group. When the Indians were ousted from their land, they in effect were told that their decision-making group, tribes, or nations, no longer had authority over the land which they formerly occupied, and most certainly not over the settlers. Force was behind this position of the white man, no matter how he might try to justify its use. When the Colonies declared their independence and went to war with Great Britain, they in effect were telling the British Crown that the decision-making group was too large and that they were no longer going to be bound by decisions made in London. Again, power, plus the political situation in Europe, implemented the decision, although a natural law justification was put forth.

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554 (1964) (Wash.); *Nolan v. Rhodes*, 378 U.S. 556 (1964) (Ohio); *Williams v. Moss*, 378 U.S. 558 (1964) (Okla.); *Germano v. Kerner*, 378 U.S. 560 (1964) (Ill.); *Marshall v. Hare*, 378 U.S. 561 (1964) (Mich.); *Hearne v. Smylie*, 378 U.S. 563 (1964) (Idaho); *Pinney v. Butterworth*, 378 U.S. 564 (1964) (Conn.); *Hill v. Davis*, 378 U.S. 565 (1964) (Iowa).

<sup>15</sup> The state reapportionment cases establish that "only one general standard—the population standard—is constitutionally permitted in apportioning both houses of a state legislature." Kauper, *Some Comments on the Reapportionment Cases*, 63 MICH. L. REV. 243, 247 (1964).

<sup>16</sup> Basing its decision on the equal protection clause, the Supreme Court established that a state apportionment scheme is subject to judicial examination, *Baker v. Carr*, 369 U.S. 186 (1962), and determined that "political equality . . . can mean only one thing—one person, one vote." *Gray v. Saunders*, 372 U.S. 368, 381 (1962). In *Wesberry v. Saunders*, 376 U.S. 1 (1964), the Court committed itself to the "one man, one vote" principle so far as congressional apportionment is concerned. "The command of Article I, § 2 . . . means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." *Id.* at 7-8.

<sup>17</sup> *Reynolds v. Sims*, *supra* note 14, at 585.

In the Constitution the attempt was made to substitute a rule of law for the power of men, with the Supreme Court of the United States having the ultimate voice on all questions of constitutional construction including the powers delegated to the federal government.<sup>18</sup> However, the power approach was tried once more on a major scale. In 1861, the southern states seceded from the Union. In effect, they were declaring the existing decision-making group, the United States of America, too large, and their consequent unwillingness to be controlled by the majority of that group. There was to be a smaller group known as the Confederate States of America; and there was for a time. But on this occasion the power was on the other side, and these states were not permitted to separate themselves from the larger group. The rightness of the cause is not presently at issue. The fact is that power implemented the decision that the southern states could not successfully withdraw. In the process, of course, more matters were made questions for decision by the larger group,<sup>19</sup> so that the effort to reduce the size of the decision-making body was counter-productive.

With these things in mind—that the Constitution was drafted to meet the needs of people and that the states (and other political entities) exist because of this same power or because of political situations—the true significance of a state is more readily apparent. A state should not be considered something divine in nature and therefore to be preserved inviolate under any and all circumstances. Philosophically, a state is merely one of society's many tools. Its right to existence depends upon its ability to meet, or help in meeting, the needs of society. A state has no justi-

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<sup>18</sup> U.S. CONST. art. III, § 2, read in light of *THE FEDERALIST* Nos. 80-82 (Hamilton), inevitably leads to this conclusion.

<sup>19</sup> As an aftermath of the Civil War, three amendments to the Constitution were proposed to the Congress and ratified by the necessary number of states. Basically, the thirteenth amendment, ratified December 18, 1865, outlawed slavery; the fourteenth amendment, ratified July 23, 1868, prohibited the states from abridging the privileges and immunities of citizens of the United States, denying any person life, liberty, or property without due process of law, and denying any person within their jurisdiction the equal protection of the laws; the fifteenth amendment, ratified March 30, 1870, guaranteed the right to vote. By these amendments, the above matters were made the subject of national concern.

fiable claim to immunity from change, and the *union* of states was admittedly accomplished to further the needs of the people. Therefore, the grants of authority to the federal government, and restrictions on both the federal and state governments ought to be construed in this light.

Adherents of such a position are not advocating abolition of the federal system, nor is it implied by them that although the system of states should be retained, the states should exercise only that authority which is permitted them by the federal government. On the contrary, the position here espoused is the original position contemplated by the founding fathers, implemented in the Constitution, and consistently followed since. There have been differences, obviously, on how much authority has been conferred upon the federal government, but there has never been any substantial doubt that ours is a government of delegated powers, with residual powers in the states and in the people. Our trouble has always been in ascertaining how much power has been delegated. It is submitted that a sound answer to this question will more likely be reached if it is kept in mind that, fundamentally, we are seeking to further the purposes of the people, rather than those of some artificial entity.

States' rights is an emotionally charged concept. It needs to be removed from our thinking so that the true problem—"Is this question appropriately a matter for decision of a larger or smaller group"—can be squarely and emotionlessly faced.

As has been previously said, on the whole the Constitution is written in general terms.<sup>20</sup> It has been perfectly clear from the beginning that it would have to be construed, and once it was determined to draft a new constitution rather than amend the Articles of Confederation and Perpetual Union, there was never a doubt that a federal supreme court would have to be created for the primary purpose of construing that constitution.<sup>21</sup>

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<sup>20</sup> See text accompanying note '13 *supra*.

<sup>21</sup> See 2 FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 432-33 (1911); MADISON'S JOURNAL 108 (Scott ed. 1895); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 9 (1953).

Since the Constitution was contemplated for the purpose of establishing the division of authority between the federal government and the states, obviously the Supreme Court of the United States was to be charged with determining from the language of the Constitution which government had what authority at any given point in time.

The Supreme Court of the United States is specifically provided for in Article III of the United States Constitution.<sup>22</sup> It is the only court created by the Constitution, although others are authorized. Its jurisdiction is defined with reasonable preciseness.<sup>23</sup> The framers knew what they were doing and what the Court would do. The people ratified the Constitution. There is no invasion of states' rights or usurpation of state power when the Court does what it is supposed to do, namely, construe the Constitution and the division of authority provided therein. For example, in determining "that a state apportionment scheme is subject to judicial examination under the Constitution," the Supreme Court was merely fulfilling its role.<sup>24</sup>

In a recent article in the *Harvard Law Review*, Professor Philip Kurland of the Chicago Law School faculty, in reviewing the Supreme Court's decisions during the 1964 term, talks about the Court's "effective subordination, if not destruction, of the federal system."<sup>25</sup> Professor Kurland is not necessarily critical of this movement; he is merely analyzing it. But he goes on to say, by way of particularization, that this subordination is obviously essential when you are construing the meaning of "equality" or, in the language of the fourteenth amendment, "equal protection of the laws." "Equality," he says, "demands uniformity of rules, and uniformity can not exist if there are multiple rule-makers. Therefore, the objective of equality can be achieved only by elimination of authorities not subordinate to the central power."<sup>26</sup>

<sup>22</sup> U.S. CONST. art. III, § 1.

<sup>23</sup> U.S. CONST. art. III, § 2.

<sup>24</sup> *Baker v. Carr*, *supra* note 16, at 244.

<sup>25</sup> Kurland, *Foreword to The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 144 (1964).

<sup>26</sup> *Ibid.*

The use of the word "subordinate" may be an unfortunate one. It implies a ranking which is in itself emotional. In fact, what the Court is doing is accepting its responsibility for determining the dimensions of the authority admittedly assigned to the national government. The words "equal protection of the laws," for instance, are capable of many meanings. If we are to have an effective system, there must be some agency which ultimately assigns a meaning which is to be accepted by all. In our system, this is the Supreme Court of the United States. The fourteenth amendment would mean little if each state had the power to make its own determination of meaning. It was never intended that each state should. Each state, when it joined the Union, and the people thereof, gave up the power to make certain independent decisions; and the Civil War determined, if there had been doubt about it, that there was no states' right to withdraw from the Union. So each state is bound, as are the people, by the Court's constructions unless they are changed by the Court or by constitutional amendment.

The United States Supreme Court has been criticized for a great many decisions, including those dealing with school desegregation,<sup>27</sup> school prayer,<sup>28</sup> and reapportionment.<sup>29</sup> The Court *may* have reached the wrong decision in each instance: separate but equal may not be inherently unequal; school prayer may not violate the establishment and free exercise clauses of the first amendment as they are included in the fourteenth; and equal protection may not command the principle "one man, one vote."

Professor Charles E. Rice, one critic of *The School Prayer Cases*, has stated that "the school prayer decisions were wrongly decided as a matter of constitutional law. Their basic fallacy lies in the Court's erroneous construction of the doctrine of neutrality which is implicit in the establishment clause of the first amendment."<sup>30</sup> Professor Rice reasons that the establishment clause was designed to achieve

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<sup>27</sup> *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

<sup>28</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>29</sup> *Baker v. Carr*, *supra* note 16.

<sup>30</sup> Rice, *Let Us Pray—An Amendment to the Constitution*, 10 CATHOLIC LAW. 178 (1964).

a governmental neutrality among religions which would preclude the preference of one particular religious sect over another. However, there was no intent to achieve a balance between theistic and non-theistic religions, with the result that any religious expression at all would be prescribed in the public schools.<sup>31</sup>

Faced with the unanimity of the Court in *The School Segregation Case, Brown v. Board of Educ.*,<sup>32</sup> many critics of the decision appear to have pragmatically subordinated outright opposition to the holding itself in order to concentrate upon the imminent problems arising from implementation of the decision. Proposed countermeasures to avoid full compliance have included the abolition of public schools, the requirement of individual school placement, the gerrymandering of school districts, delay in formulating a "plan," failure to formulate a "plan," and the establishment of elaborate administrative appeal requirements by the states.<sup>33</sup> Some of these tactics have resulted in considerable delay in effectuating the result intended by the Court.

Opposition to the "one man, one vote" mandate initially was manifested in Mr. Justice Frankfurter's and Mr. Justice Harlan's dissents in *Baker v. Carr*.<sup>34</sup> Not only did they present a historical refutation of the proposition that strict equality of voting strength was a concept of Anglo-American government,<sup>35</sup> but also they maintained that there is "nothing in the Equal Protection Clause or elsewhere in the Federal Constitution which expressly or impliedly supports the view that state legislatures must be so structured as to reflect

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<sup>31</sup> See RICE, *THE SUPREME COURT AND PUBLIC PRAYER* (1964).

<sup>32</sup> *Brown v. Board of Educ.*, *supra* note 27.

<sup>33</sup> For a discussion of some of these proposed countermeasures see Note, 15 LA. L. REV. 204 (1954). For an analysis of other proposed countermeasures and suggested remedies for use against them, see Note, 71 HARV. L. REV. 486 (1958). For a broad perspective tracing the development of implementation to 1963, see Knowles, *School Segregation*, 42 N.C.L. REV. 67 (1963). For a detailed study of the impact of implementation problems on two Kentucky schools, see Note, 45 KY. L.J. 682 (1957).

<sup>34</sup> *Baker v. Carr*, *supra* note 16.

<sup>35</sup> *Id.* at 297-325 (Frankfurter, J., dissenting); accord, Swindler, *Reapportionment: Revisionism or Revolution?*, 43 N.C.L. REV. 55 (1964), wherein the author charges that "no serious attempt has been made to reconcile the current jurisprudence of reapportionment with constitutional or political history." *Id.* at 69.

with approximate equality the voice of every voter.”<sup>36</sup> “A violation of the Equal Protection Clause thus cannot be found in the *mere* circumstances that... [a state's apportionment system] results in disproportionate vote weighting.”<sup>37</sup> This terse opposition was maintained in the most recent reapportionment cases.<sup>38</sup>

But even if these determinations are wrong, they are not unconstitutional, and they should not be opposed under any theory of states' rights.

The people, by the fourteenth amendment, have made the matter of due process and equal protection a national, rather than a regional or local question. Since there are no states' rights involved, the question is simply whether a particular result is sound or unsound insofar as furthering the interests of the people is concerned.

As for the validity of the three decisions mentioned there is, of course, a very strong body of legal opinion to the effect that each of them is valid.<sup>39</sup> And in a political context it has never been established that any one of them is opposed by a majority of either the Bar or the public. But if and when an opposed majority does exist, it can bring about a change by constitutional amendment, provided that majority is sufficiently widespread to bring about ratification in at least three-quarters of the states.<sup>40</sup> Contemporary response in this mode has brought to the floor of Congress proposed amendments and legislation which would, in effect, overrule the Supreme Court's decision in both the school prayer<sup>41</sup> and reapportionment cases.<sup>42</sup>

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<sup>36</sup> *Baker v. Carr*, *supra* note 16, at 333 (Harlan, J., dissenting).

<sup>37</sup> *Gray v. Saunders*, *supra* note 16, at 386 (Harlan, J., dissenting).

<sup>38</sup> Cases cited note 14 *supra*.

<sup>39</sup> Each of these decisions has prompted a rash of comment. The citations below have been selected as examples of the favorable reaction to each decision. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J., 64 (1962) (reapportionment); Kauper, *Segregation in Public Education: The Decline of Plessy v. Ferguson*, 52 MICH. L. REV. 1137 (1954) (desegregation); Pfeffer, *Court, Constitution and Prayer*, 16 RUTGERS L. REV. 735 (1962) (school prayer).

<sup>40</sup> U.S. CONST. art. V.

<sup>41</sup> For an examination in depth of the proposed prayer amendments, see Kenealy & Ball, *The Proposed Prayer and Bible-Reading Amendments: Contrasting Views*, 10 CATHOLIC LAW, 185 (1964); Rice, *Let Us Pray—An Amendment to the Constitution*, 10 CATHOLIC LAW, 178 (1964).

<sup>42</sup> Congressman W. M. Tuck (D-Va.) brought to the House floor a bill



To go further, if there is subordination, in Professor Kurland's words, or if there is continuing expansion of the definition of the powers conferred upon the federal government, this is not being brought about exclusively by the courts. On the contrary, both the Congress of the United States and the Executive are very much involved; and each of these is immediately responsive to the public will.

When the Congress enacts legislation, it, in effect, is saying that it believes the problem before it deserves national solution and, further, that the Constitution has conferred the necessary power to act upon it. Enactment of the Civil Rights Act of 1964<sup>43</sup> was a construction by the Congress of the commerce power which was confirmed by the Executive and the Supreme Court of the United States. If the people disagree, new congressmen will be elected, and the Act will be repealed. If this does not happen, it is suggested with deference that there is not sufficient dissatisfaction with the definition of the scope of the federal power to bring the repeal about.

Were southern legislators alone to be consulted, undoubtedly the Civil Rights Act would not have been passed to start with, and it would be immediately repealed if the question were put to them today. But it was not a local or regional question. It was a national question, and a national solution was presented. The rights of the minority were protected. They had their opportunity to argue the case; they

to strip the federal courts of all power over state legislative apportionment. After amendment extending its prohibition to pending cases the bill was passed by the House. H.R. 11625, 88th Cong., 2d Sess. (1964), renumbered 11926 as modified and passed by the House of Representatives. 110 Cong. Rec. 19580-19667 (daily ed. Aug. 19, 1964).

Senator E. Dirksen (R-Ill.) introduced a compromise measure which, as amended, would create a presumption in favor of some delay, but which would leave the courts free to proceed if they felt the public interest required it. 110 Cong. Rec. 18567-68 (daily ed. Aug. 12, 1964). The measure as first proposed was an attempt to impose on the courts a temporary moratorium on further apportionment measures. 110 Cong. Rec. 17138 (daily ed. Aug. 3, 1964).

The proposed constitutional amendment by Congressman McCulloch (R-Ohio) would permit a state to apportion one house of its legislature on factors other than population, provided such deviation from the Supreme Court's "one man, one vote" rule was approved in a state-wide referendum. H.R.J. Res. 1055, 88th Cong., 2d Sess. (1964).

<sup>43</sup> 78 Stat. 241, 42 U.S.C. § 1981 (1964).

lost. They ought not to continue the struggle in terms of states' rights; but they are, obviously, perfectly free, and properly so, to persuade a national majority that the Act should be repealed.

It is the responsibility of the legal profession first, to understand the fundamental problem, and thereafter to take to the people the real issues—how can we best form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity? With a particular issue before us, we can express an opinion on whether it should be determined at a local level, a regional level, or the national level. But ultimately, that decision, at least as between the national level and the others, will be made by the Supreme Court of the United States, which is as the framers of the Constitution planned. The issue of distribution of power is constantly before us, and must constantly be redetermined. What was a local commerce problem in 1865 may be a national problem in 1965; and as we become more and more proficient with communication and transportation, there will be more and more problems which become national in scope, demanding national solution.

The real question, invariably, is: "Are the decisions on division of power consistent with the needs of our society? Are decisions with respect to due process, equal protection, commerce, etc., rational and logical within the language of the Constitution and in light of present day circumstances?"

In a hostile world, with sophisticated systems of communication and transportation, we become in a very real sense a much smaller society in which there is a greater and greater need for concerted action. We must emphasize the purposes and policies of people and put into its proper place our servant, the state.